

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TIMOTHY C. MERCER,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Commissioner of Social Security,

Defendant.

No. 2:13-CV-03032-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF Nos. 14, 25. Attorney D. James Tree represents Plaintiff, and Special Assistant United States Attorney Thomas M. Elsberry represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

**JURISDICTION**

On April 27, 2009, Plaintiff filed an application for supplemental security income, alleging disability beginning February 17, 2002. Tr. 18; 65. Plaintiff filed

1 a previous application on May 20, 2005, for supplemental security income that was  
2 denied by an administrative law judge on August 29, 2008. Tr. 18. In the current  
3 claim, Plaintiff reported that he was unable to work due to permanent vertigo, neck  
4 pain, memory loss, migraines, restless leg syndrome, hernia, poor concentration.  
5 Tr. 137. Plaintiff also stated that he is “dizzy all the time and I have migraines  
6 constantly.” Tr. 137. Plaintiff’s claim was denied initially and on reconsideration,  
7 and he requested a hearing before an administrative law judge (ALJ). Tr. 64-111.

8 On November 30, 2011, ALJ Richard A. Say held a hearing, at which  
9 vocational expert Jennifer Gaffney, and Plaintiff, who was represented by counsel,  
10 testified. Tr. 32-53. At the hearing, Plaintiff amended his onset date to September  
11 1, 2008. Tr. 36. On December 8, 2011, the ALJ issued a decision finding Plaintiff  
12 not disabled. Tr. 18-27. The Appeals Council declined review. Tr. 1-3. The  
13 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

#### 14 **STATEMENT OF FACTS**

15 The facts have been presented in the administrative hearing transcript, the  
16 ALJ’s decision, and the briefs of the parties and thus, they are only briefly  
17 summarized here. At the time of the hearing, Plaintiff was 53 years old, single,  
18 and living in a mobile home with his youngest daughter. Tr. 39. He quit high  
19 school in the 11<sup>th</sup> grade, and later obtained a GED. Tr. 38.

20 Plaintiff’s past work includes as a truck driver, gas station attendant, hand  
21 packager, and janitor. Tr. 49. Plaintiff occasionally works part-time at Dairy  
22 Queen, where his friend is manager. Tr. 39; 43. He said he has trouble with  
23 dropping things, and one day at Dairy Queen he lost his grip and spilled five  
24 gallons of oil. Tr. 47.

25 Plaintiff testified that dizziness and headaches kept him from working  
26 regularly. Tr. 40. After he had his teeth removed and began receiving trigger point  
27 injections, Plaintiff’s daily headaches diminished to about two headaches per  
28 week. Tr. 40. Plaintiff said that his dizziness leaves him disoriented and

1 imbalanced, and unable to focus. Tr. 41. Plaintiff also testified that when he has  
2 headaches, they last about half the day, and he has to lie down in a quiet, dark  
3 room. Tr. 45. On Plaintiff's function report, he stated that his daily activities  
4 consisted of watching the news, napping, tidying up the house and preparing  
5 dinner. Tr. 148.

### 6 STANDARD OF REVIEW

7 The ALJ is responsible for determining credibility, resolving conflicts in  
8 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
9 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*,  
10 although deference is owed to a reasonable construction of the applicable statutes.  
11 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ  
12 may be reversed only if it is not supported by substantial evidence or if it is based  
13 on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial  
14 evidence is defined as being more than a mere scintilla, but less than a  
15 preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant  
16 evidence as a reasonable mind might accept as adequate to support a conclusion.  
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to  
18 more than one rational interpretation, the court may not substitute its judgment for  
19 that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec.*  
20 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). Nevertheless, a decision supported by  
21 substantial evidence will still be set aside if the proper legal standards were not  
22 applied in weighing the evidence and making the decision. *Browner v. Secretary*  
23 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial  
24 evidence exists to support the administrative findings, or if conflicting evidence  
25 exists that will support a finding of either disability or non-disability, the ALJ's  
26 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th  
27 Cir. 1987).

28 A prior final determination that a claimant is not disabled creates a

1 presumption of continuing non-disability with respect to any subsequent  
2 unadjudicated period of alleged disability. *Taylor v. Heckler*, 765 F.2d 872, 875  
3 (9th Cir. 1985). A claimant may overcome this burden by proving "changed  
4 circumstances," such as the existence of an impairment not previously considered,  
5 an increase in the severity of an impairment, or a change in the claimant's age  
6 category. *See Schneider v. Commissioner*, 223 F.3d 968, 973 (9th Cir. 2000).

### 7 **SEQUENTIAL PROCESS**

8 The Commissioner has established a five-step sequential evaluation process  
9 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
10 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one  
11 through four, the burden of proof rests upon the claimant to establish a prima facie  
12 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This  
13 burden is met once a claimant establishes that a physical or mental impairment  
14 prevents him from engaging in his previous occupation. 20 C.F.R. §§  
15 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the  
16 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that  
17 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist  
18 in the national economy which claimant can perform. *Batson v. Commissioner of*  
19 *Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an  
20 adjustment to other work in the national economy, a finding of "disabled" is made.  
21 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

### 22 **ALJ'S FINDINGS**

23 At step one of the sequential evaluation process, the ALJ found Plaintiff has  
24 not engaged in substantial gainful activity since September 1, 2008, his amended  
25 onset date, through his date of last insured on December 31, 2009. Tr. 22. At step  
26 two, the ALJ found Plaintiff suffered from "severe impairments related to  
27 headaches and vertigo." Tr. 22. At step three, the ALJ found Plaintiff's  
28 impairments, alone and in combination, did not meet or medically equal one of the

1 listed impairments. Tr. 23. The ALJ found that Plaintiff had the residual  
2 functional capacity to perform light work “with some nonexertional limitations”<sup>1</sup>  
3 and the ALJ specified the following limitations. “[h]e could never climb ladders,  
4 ropes or scaffolds. He could occasionally climb ramps and stairs, balance, stoop,  
5 kneel, crouch, and crawl. He should have avoided [sic] concentrated exposure to  
6 hazards.” Tr. 23.

7 The ALJ found that Plaintiff is unable to perform past relevant work. Tr. 25.  
8 Considering Plaintiff’s age, education, work experience and residual functional  
9 capacity, the ALJ concluded that jobs existed in significant numbers in the national  
10 economy that Plaintiff could perform, such as deli worker, office helper, and  
11 cashier. Tr. 27. As a result, the ALJ found that Plaintiff was not disabled. Tr. 27.

## 12 ISSUES

13 Plaintiff contends that the ALJ erred by (1) rejecting Plaintiff’s subjective  
14 complaints; (2) rejecting the opinions of Plaintiff’s treating and examining medical  
15 providers; and (3) failing to meet his step five burden. ECF No. 14 at 9-10.

### 16 A. Credibility

17 Plaintiff contends that the ALJ erred by finding Plaintiff had little  
18 credibility. ECF No. 14 at 18. Specifically, Plaintiff argues that the ALJ failed to  
19 provide clear and convincing reasons for rejecting his subjective complaints, and  
20 erred by concluding that Plaintiff’s daily activities were inconsistent with his  
21 complaints. ECF No. 14 at 19. Also, Plaintiff contends that the ALJ failed to  
22 explain how Plaintiff’s limited activities were inconsistent with his symptom  
23 complaints. ECF No. 14 at 19.

24 The ALJ is responsible for determining credibility. *Andrews*, 53 F.3d at  
25 1039. Unless affirmative evidence exists indicating that the claimant is

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27 <sup>1</sup>While the ALJ indicates that Plaintiff has nonexertional limitations, he  
28 inexplicably fails to specify any nonexertional limits in Plaintiff’s RFC.

1 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear  
2 and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). The ALJ's  
3 findings must be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903  
4 F.2d 1229, 1231 (9th Cir. 1990). "General findings are insufficient; rather, the  
5 ALJ must identify what testimony is not credible and what evidence undermines  
6 the claimant's complaints." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998),  
7 quoting *Lester*, 81 F.3d at 834. If objective medical evidence exists of an  
8 underlying impairment, the ALJ may not discredit a claimant's testimony as to the  
9 severity of symptoms merely because they are unsupported by objective medical  
10 evidence. *See Bunnell v. Sullivan*, 947 F.2d 341, 347-48 (9th Cir. 1991).

11 To determine whether the claimant's testimony regarding the severity of the  
12 symptoms is credible, the ALJ may consider, for example: (1) ordinary techniques  
13 of credibility evaluation, such as the claimant's reputation for lying, prior  
14 inconsistent statements concerning the symptoms, and other testimony by the  
15 claimant that appears less than candid; (2) unexplained or inadequately explained  
16 failure to seek treatment or to follow a prescribed course of treatment; and (3) the  
17 claimant's daily activities. *See, e.g., Fair v. Bowen*, 885 F.2d 597, 602-04 (9th Cir.  
18 1989); *Bunnell*, 947 F.2d at 346-47.

19 In determining a claimant's credibility, an ALJ may consider, among other  
20 factors, inconsistencies between the claimant's testimony and the claimant's daily  
21 activities, conduct and/or work record. *Light v. Social Sec. Admin.*, 119 F.3d 789,  
22 792 (9th Cir. 1997).

23 In this case, the ALJ found Plaintiff was not credible because, despite his  
24 continuing complaints of headache and vertigo, the evidence revealed some of his  
25 symptoms had improved. Tr. 24. While the record establishes that Plaintiff's  
26 debilitating headaches have decreased from daily occurrences to thrice-weekly  
27 occurrences, that fact does little to undermine Plaintiff's contention that he cannot  
28 sustain full time work. The vocational expert testified that an individual who

1 missed four or more days of work per month would be unable to sustain  
2 employment. Tr. 51. If Plaintiff experienced three debilitating headaches per  
3 week, he would likely miss more than three days per month of work.

4 Additionally, the ALJ mischaracterized Plaintiff as “active,” based upon  
5 Plaintiff’s carrying of firewood, helping unload a 300-gallon tank, and carrying  
6 five gallons of oil at Dairy Queen. Tr. 24. On April 27, 2011, Plaintiff carried  
7 split logs of firewood, one log at a time, over a distance of only five feet.<sup>2</sup> Tr. 532.  
8 However, immediately after this attempt, Plaintiff sought medical attention  
9 because he experienced “severe back pain.” Tr. 532. This very limited exertion,  
10 which afterwards necessitated medical treatment, does not reasonably give rise to  
11 an inference that Plaintiff was generally “active.”

12 Plaintiff also sought medical attention on October 19, 2010, because he was  
13 “helping his brother unload a 300-gallon tank off a truck, when it slipped, hit the  
14 ground, and fell toward him.” Tr. 386. The chart note fails to reveal if Plaintiff  
15 had an active role in carrying or transporting the tank, or if he was simply  
16 providing verbal directions. The note reveals no probative information, and  
17 Plaintiff’s mere presence and purported “aid” to his brother does not lend rise to a  
18 reasonable inference that Plaintiff was “active.”

19 Finally, the ALJ cites Plaintiff’s testimony that he was able to carry a five-  
20 gallon container of oil, while at work, to establish that he is “active.” Tr. 24.  
21 However, Plaintiff testified that he was actually *unable* to carry the container, and  
22 he “just dropped the whole thing all over the floor ... that was a mess.” Tr. 47.  
23 Plaintiff’s unsuccessful attempt at carrying a full five gallon container does not  
24 give rise to a reasonable inference that he is engaged in an “active” lifestyle.

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26 <sup>2</sup>The medical record from Plaintiff’s April 27, 2011, office visit indicates  
27 Plaintiff told his provider that he was “carrying one log at a time to only five feet.”  
28 Tr. 432.



1 Moreover, the ALJ's reliance upon Plaintiff's daily activities as undermining  
2 his credibility is misplaced, and the record does not support the ALJ's  
3 characterizations of Plaintiff's activities. For example, the ALJ noted that despite  
4 Plaintiff's complaints he suffers extreme dizziness, he "testified he still drives up  
5 to eight miles at a time and presently works 18 hours a week at a Dairy Queen  
6 restaurant performing cleaning tasks." Tr. 24.

7 The record reveals that these activities – driving and working – are limited  
8 and Plaintiff requires accommodation. For example, Plaintiff reported that the  
9 greatest distance he can drive is about eight miles, the distance from his house to  
10 Dairy Queen. Tr. 41. His wife had to drive him to the hearing because it was too  
11 far for him to drive. Tr. 41. Plaintiff's long-time friend is the manager of Dairy  
12 Queen. Tr. 43. He explained that when dizziness overcomes him, which happens  
13 about once per week during a work shift, another worker has to take over for him  
14 while he spends at least 30 minutes recovering in the back of the store. Tr. 43.  
15 After a shift at work, Plaintiff said his head hurts, he is dizzy, and he is "wiped  
16 out." Tr. 43. In sum, Plaintiff's limited ability to drive short distances and his  
17 ability to work part time, with accommodation, does not undermine Plaintiff's  
18 allegations of disabling complaints.

19 Finally, the ALJ noted that in Plaintiff's daily function report, dated June 8,  
20 2009, Plaintiff denied problems with grooming and hygiene and indicated that he  
21 prepares daily meals, and he performs household chores including laundry and  
22 grocery shopping. Tr. 25. Plaintiff's function report revealed limited activities  
23 that included daily feeding of children, watering dogs, daily food preparation,  
24 laundry, "repairs," and grocery shopping once per week. Tr. 149-51. He reported  
25 he can no longer ride horses, swim, hunt, or go on long drives. Tr. 152. He is  
26 limited to fishing once per year. Tr. 152.

27 The mere fact that a claimant engages in activities such as grocery shopping  
28 and driving a car does not detract from credibility as to overall disability. "One



1 does not need to be utterly incapacitated in order to be disabled." *Vertigan v.*  
2 *Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *see also Cooper v. Bowen*, 815 F.2d  
3 557, 561 (9th Cir. 1987) (a claimant need not "vegetate in a dark room" to be  
4 eligible for benefits).

5 Moreover, daily activities may only form the basis of an adverse credibility  
6 finding if the claimant is able to spend "a substantial part of his day engaged in  
7 pursuits involving the performance of physical functions that are transferable to a  
8 work setting." *Fair*, 885 F.2d at 603. "In evaluating whether the claimant satisfies  
9 the disability criteria, the Commissioner must evaluate the claimant's ability to  
10 work on a sustained basis. " *Lester*, 81 F.3d at 833. "Occasional symptom-free  
11 periods—and even the sporadic ability to work—are not inconsistent with  
12 disability." *Id.* The ALJ's conclusion that Plaintiff is not credible is not supported  
13 by substantial evidence in the record. Plaintiff did describe a number of daily  
14 activities, but the descriptions, when reviewed in context of the whole record, show  
15 a person accomplishing limited tasks that would not translate to the ability to  
16 sustain gainful, continuous employment.

## 17 **B. Medical Opinions**

18 As a general rule, more weight should be given to the opinion of a treating  
19 source than to the opinion of doctors who do not treat the claimant. *Lester*, 81 F.3d  
20 at 830. Where the treating doctor's opinion is not contradicted by another doctor, it  
21 may be rejected only for "clear and convincing" reasons. *Id.* Where the treating  
22 doctor's opinion is contradicted by another doctor, the ALJ may not reject this  
23 opinion without providing "specific and legitimate reasons" supported by  
24 substantial evidence in the record. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.  
25 1983).

### 26 **1. William Bothamley, M.D.**

27 Plaintiff contends the ALJ erred by relying upon invalid reasons for rejecting  
28 the opinions from Plaintiff's treating physician William Bothamley, M.D. ECF

1 No. 14 at 12-15.

2 On June 21, 2010, Dr. Bothamley completed a Medical Report form. Tr.  
3 392-93. In that form, Dr. Bothamley noted that Plaintiff had to lie down during the  
4 day, on average, every other day up to two hours due to headaches, neck pain,  
5 vertigo and fatigue symptoms. Tr. 392. Dr. Bothamley opined that work on a  
6 continuous basis would cause Plaintiff's condition to deteriorate, and Plaintiff  
7 would likely miss four or more days per month due to his symptoms. Tr. 393.

8 On March 4, 2011, Dr. Bothamley completed a second Medical Report form  
9 in which he noted that Plaintiff had to lie down for at least one hour per day, due to  
10 headaches, dizziness and vertigo. Tr. 376-78. Dr. Bothamley opined that work on  
11 a continuous basis would cause Plaintiff's condition to deteriorate, and Plaintiff  
12 would likely miss four or more days per month due to his symptoms. Tr. 377. Dr.  
13 Bothamley also opined that Plaintiff was limited to sedentary work. Tr. 377.

14 The ALJ gave little weight to the assessments of Dr. Bothamley. Tr. 25.  
15 First, the ALJ asserted that no evidence established Plaintiff is limited to sedentary  
16 work, and that Dr. Bothamley's treatment records reveal Plaintiff's daily activities  
17 contradict the limitation to sedentary work. Tr. 25. As analyzed above, Plaintiff's  
18 daily activities were minimal and did not establish that Plaintiff was able to spend  
19 a substantial part of his day in activities that were transferable to a work setting.  
20 *See Fair*, 885 F.2d at 603. As such, Plaintiff's activities did not provide a reason  
21 to discount the physician's opinion.

22 The ALJ also found "there is no evidence that Dr. Bothamley has evaluated  
23 the claimant's cognitive function, indicating total reliance on the claimant's  
24 subjective complaints." Tr. 25. This assertion indicates that the ALJ failed to  
25 properly apply the regulation that favors giving greater weight to a treating  
26 physician's opinion because the treating relationship provides a greater opportunity  
27 to know and observe the patient overall, as an individual. See 20 C.F.R. §

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404.1527(d)(2);<sup>3</sup> *see also*, *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996). It is not clear what the ALJ believes is lacking related to Dr. Bothamley's evaluation of Plaintiff's cognitive functioning, but this premise is unfounded and does not support the ALJ's conclusion that Dr. Bothamley engaged in "an inordinate degree of reliance upon the subjective descriptions of symptomology and limitation set forth by [Plaintiff]." Tr. 25. A treating physician opinion is afforded more weight because those physicians treat patients over time and have greater opportunity to observe the patient and know him or her as an individual. *Morgan*, 169 F.3d at 600.

Finally, the ALJ's speculation that Dr. Bothamley purposefully exaggerated his findings in order to assist Plaintiff is an invalid reason, and is not supported by the record, "[w]hile difficult to confirm, the possibility always exists that a doctor may express an opinion in an effort to assist an individual with whom he or she sympathizes for one reason or another. As such, Dr. Bothamley's assessment are [sic] considered with caution." Tr. 25.

The purpose for which a report is obtained does not provide a legitimate basis for rejecting it. *See Lester*, 81 F.3d at 832 (ALJ may not assume treating

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<sup>3</sup>20 C.F.R. § 404.1527(d)(2) provides in part:

Treatment relationship. Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.

1 doctors routinely lie in order to help their patients collect disability benefits);  
2 *Saelee v. Chater*, 94 F.3d 520, 523 (9th Cir. 1996); *Reddick*, 157 F.3d at 726-27  
3 (ALJ erred in assuming that the treating physician's opinion was less credible  
4 because his job was to be supportive of the patient). Nothing in this record  
5 suggests that Dr. Bothamley disbelieved Plaintiff's description of his symptoms, or  
6 that over the years, Dr. Bothamley relied on Plaintiff's descriptions more heavily  
7 than his own clinical observations. As such, the ALJ's conclusion that Dr.  
8 Bothamley exaggerated his findings in order to assist Plaintiff obtain benefits is not  
9 a valid reason on which to discount the doctor's opinion.

10 Because the ALJ failed to provide valid reasons for discounting the opinion  
11 of Dr. Bothamley, this case must be remanded for a new evaluation of Dr.  
12 Bothamley's opinion.

13 **2. Steven Woolpert, M.S., MHP**

14 Plaintiff contends that the ALJ erred by rejecting the opinions of Plaintiff's  
15 treating mental health provider, Steven Woolpert, M.S., MHP. ECF No. 14 at 15-  
16 17. Specifically, Plaintiff contends the ALJ's reasons for rejecting the opinion are  
17 invalid.

18 Mr. Woolpert regularly treated Plaintiff from July 2009, to February 2011.  
19 Tr. 401-34. Mr. Woolpert first saw Plaintiff in July 2009, shortly after Plaintiff's  
20 wife told him she wanted a divorce, and left him to care for two adolescent  
21 daughters. Tr. 427-34. On September 28, 2009, Mr. Woolpert observed Plaintiff  
22 exhibited symptoms of depression, such as change in sleep pattern, insomnia  
23 changes in appetite, depressed mood, feelings of worthlessness or guilt, loss of  
24 interested or pleasure. Tr. 424.

25 On January 28, 2010, Mr. Woolpert noted that Plaintiff's pain and dizziness  
26 "greatly affects his functioning as well as his mood." Tr. 418. On September 9,  
27 2010, Mr. Woolpert noted that Plaintiff looked weary from managing his physical  
28 problems and family stress, and Plaintiff reported that headaches and dizziness

1 significantly limited his activities. Tr. 412. On October 14, 2010, Plaintiff  
2 reported his dizziness was severe. Tr. 411. On December 14, 2010, Plaintiff said  
3 he had a lingering headache that made it difficult for him to concentrate, and Mr.  
4 Woolpert noted that Plaintiff appeared tired. Tr. 409.

5 On January 3, 2011, Plaintiff said he had “turned” his back a few days prior  
6 and he appeared to be in pain, and Mr. Woolpert observed that Plaintiff had  
7 difficulty with his posture and with walking. Tr. 408. On February 15, 2011,  
8 Plaintiff reported his symptoms of dizziness and headaches were improving with  
9 medication. Tr. 405.

10 On February 14, 2011, Mr. Woolpert completed a form Mental Residual  
11 Capacity Assessment. Tr. 401-03. He assessed Plaintiff with two marked  
12 limitations in the ability to maintain attention and concentration for extended  
13 periods and complete a normal workday and workweek without interruptions from  
14 psychologically based symptoms and to perform at a consistent pace without an  
15 unreasonable number and length of rest periods. Tr. 402. Mr. Woolpert assessed  
16 Plaintiff with three moderate limitations, including the ability to: (1) understand  
17 and remember detailed instructions; (2) carry out detailed instructions; and (3)  
18 perform activities within a schedule, maintain regular attendance and be punctual  
19 within customary tolerances. Tr. 401. Mr. Woolpert stated that Plaintiff was  
20 receiving treatment for major depressive disorder, which continued to have  
21 significant limitations on his ability to concentrate, and his energy level needed to  
22 sustain tasks, as well as limitations on his memory and recall. Tr. 403.

23 The ALJ rejected the opinions from Mr. Woolpert because (1) he was an  
24 “unacceptable medical source”; (2) no “objective evidence” existed to support  
25 allegations of cognitive deficits reported by Mr. Woolpert; and (3) Jay M. Toews,  
26 Ed.D., an examining physician, provided a contradictory opinion. Tr. 23.

27 In evaluating the weight to be given to the opinion of medical providers,  
28 Social Security regulations distinguish between "acceptable medical sources" and

1 "other sources." Acceptable medical sources include, for example, licensed  
2 physicians and psychologists, while other non-specified medical providers are  
3 considered "other sources." 20 C.F.R. §§ 404.1513(a) and (e), 416.913(a) and (e),  
4 and SSR 06-03p. An ALJ is required to consider observations by non-acceptable  
5 medical sources as to how an impairment affects a claimant's ability to work.  
6 *Sprague*, 812 F.2d at 1232. In determining the weight to give an opinion from an  
7 "unacceptable" source, the ALJ considers: the length of time the source has known  
8 the claimant and the number of times and frequency that the source has seen the  
9 claimant; the consistency of the source's opinion with other evidence in the record;  
10 the relevance of the source's opinion; the quality of the source's explanation of his  
11 opinion; and the source's training and expertise. SSR 06-03p.

12 An ALJ must give reasons germane to "other source" testimony before  
13 discounting it. *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993). To qualify as  
14 germane, a reason for disregarding the testimony of a lay witness must be more  
15 than a wholesale dismissal of all such witnesses as a group, but rather must be  
16 specific to the individual witness. *Smolen*, 80 F.3d at 1288.

17 The ALJ's first reason for rejecting Mr. Woolpert's opinion was invalid  
18 because it amounts to a wholesale dismissal of all non-accepted medical providers.

19 Similarly, the ALJ's second reason for rejecting Mr. Woolpert's opinion  
20 because no "objective evidence" existed to support cognitive deficits is also  
21 invalid. Tr. 23. When rejecting opinion evidence, the ALJ must provide "a  
22 detailed and thorough summary of the facts and conflicting clinical evidence,  
23 stating his interpretation thereof, and making findings." *Reddick*, 157 F.3d at 725.  
24 The ALJ must do more than merely state his conclusions: "[h]e must set forth his  
25 own interpretations and explain why they, rather than the doctors', are correct." *Id.*  
26 (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). "Merely to state  
27 that a medical opinion is not supported by enough objective findings 'does not  
28 achieve the level of specificity our prior cases have required, even when the



1 objective factors are listed seriatim." *Rodriguez v. Bowen*, 876 F.2d 759, 762 (9th  
2 Cir. 1989), quoting *Embrey*, 849 F.2d at 421. "Disability may be proven by  
3 medically-acceptable clinical diagnoses, as well as by objective laboratory  
4 findings." *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975). In this case,  
5 the ALJ failed to provide specific reasons, and instead provided a broad conclusion  
6 that no objective evidence existed to support the impairments. As a result, this is  
7 not a valid reason upon which to disregard Mr. Woolpert's conclusions.

8 The ALJ's third reason for rejecting Mr. Woolpert's opinion relied upon the  
9 report from a July 24, 2008, evaluation by examining physician Jay M. Toews,  
10 Ed.D. Tr. 23. Jay M. Toews, Ed.D., examined Plaintiff, and produced a reported  
11 dated August 7, 2008. Tr. 226-29. Dr. Toews administered a brief mental status  
12 exam, and reported Plaintiff's thinking was coherent and based in reality, and  
13 Plaintiff's mood was neutral. Tr. 228. Dr. Toews reported "there was no  
14 indication of disequilibrium, balance problems, or indication of dizziness." Tr.  
15 228. Dr. Toews also administered an MMPI-2, and he found the resulting profile  
16 "of dubious validity." Tr. 228. Dr. Toews opined that a high probability existed  
17 that Plaintiff over endorsed symptoms, and it was unlikely he was over-endorsing  
18 his symptoms in order to call attention to his psychic distress, but instead he was  
19 likely engaging in a deliberate effort to present as impaired. Tr. 228. Finally, Dr.  
20 Toews noted that Plaintiff's attention and concentration may be impaired, but "one  
21 cannot be certain." Tr. 229.

22 Dr. Toews' report is of little probative value, because the single exam  
23 occurred prior to Plaintiff's previous denial of benefits, and thus does not relate to  
24 the period at issue in this case.<sup>4</sup> Moreover, the ALJ must give weight to the  
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26 <sup>4</sup>The court notes Plaintiff's argument that Dr. Toews' opinion deserves little  
27 weight because Plaintiff provided "extensive evidence ... regarding his lack of  
28 credibility as an examining doctor." ECF No. 14 at 16. While the court is



1 treating provider's subjective judgments in addition to the provider's clinical  
2 findings and interpretation of test results. *Lester*, 81 F.3d at 830. In this case, the  
3 ALJ erred by giving more weight to a one-time examining physician than to  
4 Plaintiff's treating medical provider.

5 In sum, the ALJ failed to provide valid reasons, supported by substantial  
6 evidence for rejecting the opinions of Mr. Woolpert, Plaintiff's treating mental  
7 health care provider, and on remand, the ALJ will reconsider Mr. Woolpert's  
8 opinion.

### 9 C. Step Five

10 Plaintiff argues that the vocational expert's testimony was without value,  
11 because the ALJ posited an incomplete hypothetical. ECF No. 14 at 20. In light of  
12 the necessity for remand, the court will not address this contention, and the ALJ  
13 will make new step five findings on remand.

## 14 CONCLUSION

15 Having reviewed the record and the ALJ's findings, the court concludes the  
16 ALJ's decision is based on legal error, and requires remand. On remand, the ALJ  
17 is directed to reevaluate Plaintiff's credibility and the medical opinions, and revise  
18 Plaintiff's RFC to specify nonexertional impairments. The decision is therefore  
19 REVERSED and the case is REMANDED for further proceedings consistent with  
20 this opinion. Accordingly,

### 21 IT IS ORDERED:

22 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is  
23 **GRANTED.**

24 2. Defendant's Motion for Summary Judgment, **ECF No. 25**, is  
25 **DENIED.**

26  
27 troubled by this allegation, under these circumstances, the court need not reach this  
28 issue.

1           3.     An application for attorney fees may be filed by separate motion.  
2     The District Court Executive is directed to file this Order and provide a copy to  
3     counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff, and the  
4     file shall be CLOSED.

5           DATED July 7, 2014.

A handwritten signature in black ink, appearing to be "M", is written above a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE